Supreme Court, U.S.
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No. 93-1881

In The

Supreme Court of the United States

October Term, 1993

DENNIS RUARK, SR. and MARY RUARK,

Plaintiffs/Petitioners,

vs.

LELAND BOATWRIGHT,
GREGG REED and ROBERT COMER,

Defendants/Respondents.

Petitioner For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE PETITIONER FAILED TO SET FORTH SPECIAL AND IMPORTANT REASONS SUFFICIENT TO GRANT THE SAME.

A. THE EIGHTH CIRCUIT CORRECTLY APPLIED THIS COURT'S STANDARD, FOR EIGHTH AMENDMENT COMPLAINTS, AS SET FORTH IN *ESTELLE V GAMBLE*, 429 U.S. 97 (1976) AND *WHITLEY V ALBERS*, 475 U.S. 312 (1986); and

B. THE HOLDING OF THE EIGHTH CIRCUIT DOES NOT REFLECT CONFUSION OF THE APPELLATE COURTS IN DEFINING THE PHRASE "DELIBERATE INDIFFERENCE".

II. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT TO ALL DEFENDANTS, IN THAT PETITIONERS ALLEGED INSUFFICIENT FACTS, EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO PETITIONERS, TO SUPPORT AN EIGHTH AMENDMENT VIOLATION OF INADEQUATE MEDICAL CARE, OR DELIBERATE INDIFFERENCE TO A KNOWN SERIOUS MEDICAL NEED.

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STATEMENT OF CASE

Plaintiffs/petitioners brought a claim for relief under Title 42 USC §1983 claiming damages from defendants/respondents for the death of their son, decedent Dennis Ruark, Jr. (Ruark). Ruark died on September 30, 1985, while he was confined in the Jasper County Jail. The cause of action was filed by plaintiffs on September 28, 1988, against Sheriff Leland Boatwright, Warden Don Drury, Deputy Warden Dick Fair, Deputy Sheriffs Gregg Reed and Cotton Comer, and Jasper County, Missouri. Plaintiffs alleged defendants failed to obtain medical assistance for their son until his condition was irreversible, thereby causing his death.

The facts surrounding plaintiffs' complaint began when Ruark, who was incarcerated at the Jasper County Jail, was allowed a one day leave on a work release program the morning of September 29, 1985. Unknown to the defendants, prior to his return to the jail Ruark obtained and consumed what turned out to be a lethal dose of liquid morphine. Ruark returned to the jail that evening, between 6:00 and 7:00 p.m., was routinely strip searched, and returned to his bunk in B Dormitory of the jail. "B" Dormitory housed approximately sixteen inmates. (Pl. App. 134, Jail Record, Pl. App. 39). Shortly thereafter, Ruark retired for the evening.

The next morning, over approximately a one hour period of time, between 6 a.m. and 7 a.m., Defendant Comer tried to awaken Ruark several times during routine wake up calls. The first call came, according to Defendant Comer's FBI interview, taken November 25, 1985, (Pl. App. 83) and Comer's deposition, taken April

30, 1992 (Pl. App. 155), when Comer "hollered" to the inmates to wake up at 6:00 a.m. as usual. He returned at 6:15 a.m. to check on the work release inmates after he was through feeding breakfast to all inmates. Finding Ruark still asleep, Comer shook him at which time he reported receiving a mumble in reply. (Pl. App. 156-158). He noted at 6:15 that Ruark was breathing "raspily". (Pl. App. 156).

Comer advised he left the cell on other duties and returned at around 6:30 a.m. to try to awaken Ruark one more time. When he returned, he observed Ruark still asleep, lying in a different position and breathing "blubberly". (Pl. App. 158). At this point, Comer reports he began to suspect Ruark may have gotten drunk during his release to relatives the previous day and, seeing the spittle coming from his mouth, may have gone to sleep with tobacco in his mouth. (Pl. App. 84; Pl. App. 162). Comer "became alarmed and summoned the other guard on duty, Gregg Reed to go get help." (Pl. App. 164 and 166).

Although he does not recall the time, Defendant Reed first learned of a problem with Ruark after Comer notified him he was having trouble waking Ruark for work release. (Pl. App. 211). When he entered the dormitory, Reed found Ruark laying on his stomach. (Pl. App. 212). He observed Ruark had "labored breathing" and was "warm to the touch". (Pl. App. 212). He took Ruark's pulse, checked his pupils to react to light and at that time observed brown fluid at the corner of his lips and nose. (Pl. App. 212 and 214).

Reed testified he did not administer any kind of medical assistance at that time, in that his training as an EMT was that " . . . you make no attempt to render aid unless the respirations or the pulse stops." (Pl. App. 216). Ruark had both. (Pl. App. 216). Instead, Reed testified he went to Sheriff Boatwright and advised there was a "real sick" inmate who needed assistance. (Pl. App. 216-219).

Boatwright testified he did not recall whether he or the jail dispatcher called the hospital, but he knew following Reed's warning the call was made immediately "before anybody said why, where, and all about it." (Pl. App. 363). Thereafter, although Ruark received emergency care, he died a short time later at approximately 7:36 a.m. on September 30, 1985. (Pl. App. 99-100).

The autopsy report (Pl. App. 31-34) states:

> The blood morphine level would be consistent with impaired consciousness. **The immediate cause of death is felt to be hypoxia secondary to severe acute bilateral aspiration pneumonia related to an impaired state of consciousness due to an elevated blood morphine level.** (Emphasis added).

The findings in the lungs, of aspirated gastric debris, combined with the coroner's opinion of the immediate cause of death, reveal Ruark's system simply shut down due to the drug overdose.

Ruark had been consistently difficult to awaken in the morning for work release. (Pl. App. 40, 53 and 497-499). A defendant in the early proceedings of this case testified:

> It's just that I got complaints by quite frankly every security officer that worked – that was responsible for waking him up. They said they could not get him woke up. (Pl. App. at 498).

On the morning of September 30, 1985, Reed and Comer saw nothing more than the same behavior Ruark had exhibited on many occasions prior thereto, (i.e., refusing to get up for work release). They had absolutely no reason to suspect anything out of the ordinary and were not advised of anything out of the ordinary by the other inmates in Dorm B. To the contrary, one fellow inmate even went so far as to advise Reed that Ruark was "just sleeping heavy" and to "leave him alone". (Pl. App. 70).

SUMMARY OF ARGUMENT

A petition for Writ of Certiorari will be granted " . . . **only when there are special and important reasons therefore.**". Petitioners attempt to argue the Eighth Circuit Court of Appeals applied a different standard of "deliberate indifference", to their Eighth Amendment claim, and further attempt to argue the existence of a conflict of opinions among the various United States Circuit Courts of Appeal as to the proper definition of "deliberate indifference". The United States Supreme Court and Courts of Appeal use a variety of adjectives, nouns and adverbs to describe the culpable state of mind required for a successful Eighth Amendment claim. The use of various adjectives, nouns and adverbs does not establish a true conflict among the courts of appeal sufficient to merit a Writ of Certiorari.

The Eighth Circuit Court of Appeals properly applied this Court's standard for the burden of proof in a Title 43 §1983 cause of action, alleging a deliberate indifference to a known serious medical need. Accordingly the Eighth Circuit's affirmation of the trial court's summary judgment was appropriate.

ARGUMENT

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE PETITIONER FAILED TO SET FORTH SPECIAL AND IMPORTANT REASONS SUFFICIENT TO GRANT THE SAME.

Rule 10 of the Rules of the Supreme Court sets forth "Considerations Governing Review on Writ of Certiorari". The Rule clearly states a Petition for Writ of Certiorari will be granted " . . . **only when there are special and important reasons therefore.**".

Supreme Court Rule 10 sets forth three main considerations under which a writ will be considered. Of the three, the only possible consideration that could apply to the case now before the Court is Rule 10.1(a) providing that a Writ of Certiorari may be granted when a court of appeals renders a decision in conflict with the decision of another court of appeals.

In the case at issue, the decision of the Eighth Circuit Court of Appeals is not in conflict with any other appellate court or Supreme Court decision, nor is it a unique or

unusual opinion. Respondent would submit to this Court that there are neither special nor important reasons to burden this Court with review of the above-styled case. Accordingly, the petition for Writ of Certiorari must be denied.

Petitioner's attempt to bootstrap an argument in support of their Petition, alleging the Eighth Circuit incorrectly required them to prove "both deliberate indifference and wantonness and obduracy on their part". Petitioners' actually state at page 11 of their Petition:

> in other words the Eighth Circuit imposed a requirement of wantonness and obduracy *in addition* to deliberate indifference. (Petitioner's emphasis).

A careful reading of the Eighth Circuit opinion reveals Petitioners' argument is simply unfounded.

Petitioners attempt to distinguish levels of deliberate indifference, running from a "particularly high standard of proof" of wantonness and obduracy to a "less demanding standard" of deliberate indifference. Respondents strongly disagree.

The appellate court decisions, interpreting the legal phrase "deliberate indifference", simply utilize various terms to describe the requisite state of mind to establish an Eighth Amendment violation. The appellate courts are not creating different levels of deliberate indifference, or different tests; rather they are confirming this court's holding that it takes something more than mere negligence, such as "obduracy and wantonness", to constitute deliberate indifference.

Regardless of how "deliberate indifference" is defined or described, both the trial court and the Eighth Circuit Court of Appeals clearly stated in their opinion they simply did not find sufficient evidence with which to show a culpable state of mind on the part of the respondents.

(A) THE EIGHTH CIRCUIT CORRECTLY APPLIED THIS COURT'S STANDARD, FOR EIGHTH AMENDMENT COMPLAINTS, AS SET FORTH IN *ESTELLE V. GAMBLE*, 429 U.S. 97 (1976) AND *WHITLEY V. ALBERS*, 475 U.S. 312 (1986).

In affirming summary judgment as to Reed, Boatwright and Comer, the Eighth Circuit Court of Appeals held that it could not conclude these individuals acted in such a way that constituted "obduracy and wantonness." (A-10)[1]. Petitioners now argue, the Eighth Circuit has carved a new standard to determine whether a prisoner's Eighth Amendment right was violated. Petitioners contend the Eighth Circuit "tacked on an additional requirement that the delay in obtaining medical help 'must also be prompted by obduracy and wantonness, not inadvertence or error in good faith.' " (Brief at 9, citing (a-7)). Respondents strongly disagree with petitioners' interpretation of the Eighth Circuit opinion.

Failure to provide medical care for a prisoner may be defined as "cruel and unusual punishment" and violative of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97

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[1] All references to "A" will refer to Petitioners' appendix as set forth in their Petition for Writ of Certiorari.

(1976). This Court noted in *Estelle*, that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." 429 U.S. at 104 (citations omitted). The terms "deliberate indifference", "obduracy" and "wantonness" are terms the Supreme Court has used in defining the parameters of "cruel and unusual punishment." In *Whitley v. Albers*, 475 U.S. 312, 319 (1986), this Court noted:

> [t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cell block.

It has long been held by this Court that in order to demonstrate an Eighth Amendment violation on the basis of inadequate medical care, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A plaintiff *must* demonstrate defendant's "culpable state of mind", or an intent to deny medical treatment to a known serious medical need, in order to establish an Eighth Amendment violation on the basis of inadequate medical care. *Wilson v. Seiter*, 501 U.S. ___, 115 L.Ed. 2d. 271 (1991). Negligence, even gross negligence, or error in good faith is not sufficient to support a claim of medical mistreatment under the

Eighth Amendment. *Bellecourt v. United States*, 784 F.Supp. 623, 634 (D. Minn. 1992); *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Like the Supreme Court in *Whitley*, the Eighth Circuit in the instant cause has used the terms "wantonness", "obduracy" and "deliberate indifference" interchangeably. Using interchangeable words does not change the underlying standard provided by this Court.

The lower courts analyzed the conduct of the three respondents individually. As to Respondent Comer, the Eighth Circuit held:

> we also agree with the trial court that the Ruarks have failed to establish the existence of a genuine issue of material fact with respect to any "obduracy and wantonness," *Whitley v. Albers*, 475 U.S. at 319 . . . " (A-8).

In other words, Respondent Comer was not "deliberately indifferent" to Mr. Ruark's medical needs, therefore Respondent Comer's conduct could not be defined as "cruel and unusual punishment."

As to Respondents Reed and Boatwright, the Eighth Circuit affirmed the trial court's holding that a twenty-minute delay in calling an ambulance, in and of itself, does not constitute obduracy and wantonness nor does it establish that Respondent Boatwright

> 'acted in callous disregard' of Mr. Ruark's 'constitutional right to have medical attention.' (A-10)

In other words, Respondents Reed and Boatwright cannot be characterized as being "deliberately indifferent" to Mr. Ruark's medical needs.

In their brief, petitioners implied the Eighth Circuit incorrectly relied on *Whitley v. Albers*, 475 U.S. 312 (1986), a prison riot case, because the *Whitley* Court defined wantonness as force that was "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-321. Petitioners contend, therefore, that to be forced to prove "obduracy and wantonness", as defined in *Whitley*, establishes an additional, or higher hurdle for claimants to overcome. (Pet.Brief at 11). Respondents disagree with petitioners' argument.

The Eighth Circuit cited *Whitley* as a case that established the parameters of conduct that would violate a prisoner's right to be free from Cruel and Unusual Punishment. The lower court did not analyze Ruark's need for medical treatment, by defining the terms "wantonness" and "obduracy" in prison riot cases such as the case in *Whitley* and *Hudson v. McMillian*, 503 U.S. ___, 117 L.Ed.2d 156, 165 (1992). The Eighth Circuit merely applied the dicta in the *Whitley* opinion whereby the Supreme Court analyzed the definition of "wantonness" and "obduracy" in different prison contexts, including failure to provide medical treatment and failure to control a "tumultuous cell block".

(B) THE HOLDING OF THE EIGHTH CIRCUIT DOES NOT REFLECT CONFUSION OF THE APPELLATE COURTS IN DEFINING THE PHRASE "DELIBERATE INDIFFERENCE"

In addition to asserting the Eighth Circuit created a new standard applicable to an Eighth Amendment claim, petitioners also contend there is "generalized confusion"

among the circuit courts as to the definition of "deliberate indifference." Like this Court in *Estelle,* supra, circuit courts have defined the phrase "deliberate indifference" by describing various factual situations that may or may not qualify as "deliberate indifference". In *Estelle,* this Court noted indifference was manifested:

> by prison doctors in their response to prisoners' needs or by prison guards in intentionally denying or delaying access to medical care. *Estelle,* at 105.

Accidental or inadvertent failure to provide medical care cannot be construed as "deliberate indifference", nor can it be construed as "an unnecessary and wanton infliction of pain." *Id.*

In *Duckworth v. Franzen,* 780 F.2d 645 (7th Cir. 1985), the Seventh Circuit illustrates the meaning of "deliberate indifference" by providing factual examples. The Seventh Circuit noted that if prison staff merely misdiagnosed a prisoner's illness, thinking it was trivial, and consequently the prisoner dies, such conduct "would not be punishment in any accepted meaning of the word, even if the diagnosis was negligent." *Duckworth,* at 652. In *Howell v. Evans,* 922 F.2d 712 (11th Cir. 1991), the Eleventh Circuit stated a plaintiff, or plaintiffs, could demonstrate a prison official's actions violated the standard set forth in *Estelle* by demonstrating that the facts were similar to factual situations of prior cases which found "deliberate indifference". *Howell,* at 719-720. In *Rellegert v. Cape Girardeau County, Missouri,* 924 F.2d 794 (8th Cir. 1991), the Eighth Circuit analyzed the definition of "deliberate" as it relates to inmate suicide cases when it noted:

> We have considered the facts of this case vis-a-vis the many appellate decisions to which we have cited in others arising from inmate suicides. While we conclude that the laws clearly establish that jailers must take measures to prevent inmate's suicide once they know of the suicide risk, we cannot say that the law is established with any clarity as to what those measures must be. *Rellegert* at 797.

While it is true the Seventh Circuit Court of Appeals in *Duckworth, supra,* points out the term "deliberate indifference" is not self-defining, much like the phrases "substantive due process" or "all deliberate speed", the fact that the circuit courts use a variety of adjectives, nouns and adverbs to describe "deliberate indifference" does not rise to the level of conflicting decisions for which this Court would grant a Writ of Certiorari.

II. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT TO ALL DEFENDANTS, IN THAT PETITIONERS ALLEGED INSUFFICIENT FACTS, EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO PETITIONERS, TO SUPPORT AN EIGHTH AMENDMENT VIOLATION OF INADEQUATE MEDICAL CARE, OR DELIBERATE INDIFFERENCE TO A KNOWN SERIOUS MEDICAL NEED.

Petitioner's second issue for consideration argues that Eighth Circuit incorrectly applied the test for granting summary judgment by refusing to consider evidence

of an affidavit prepared by petitioner's investigator. Petitioner argues "the Eighth Circuit implied that the affidavit was too incredible to be believed . . . (A-8)." Even a cursory reading of page A-8 reveals the 8th Circuit did in fact consider the affidavit when it stated:

> Even if we were to hold, moreover, that a genuine issue of material fact existed with respect to Mr. Ruark's condition at 6:15 a.m., we also agree with the trial court that the Ruarks have failed to establish the existence of a genuine issue of material fact with respect to any 'obduracy and wantonness,' *Whitley v. Albers*, 475 U.S. at 319, on Mr. Comer's part that could justify imposing liability on him under the eighth amendment. (A-8, 9).

In other words, even assuming the affidavit to be true and correct, the petitioners failed to establish the state of mind required to impose liability under the Eighth Amendment.

Although petitioners may have made competent allegations of an Eighth Amendment violation in their initial pleadings, summary judgment is appropriate if the subsequent discovery fails to uncover sufficient evidence to support those allegations. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). Petitioners had the burden of establishing, with sufficient evidence, a "genuine factual dispute" as to whether or not the conduct of respondents Comer, Reed and Boatwright, was deliberately indifferent to Ruark's known, serious medical need. Petitioners failed to produce such evidence.

Respondents would point out there was essentially no dispute in the basic facts surrounding this case. Both parties agree Ruark was released from jail on September 29, 1985, whereupon he gained access to a quantity of narcotics and ingested them. Both parties agree that the following morning, Defendant Comer attempted to wake Ruark by "hollering" at him at 6:00 a.m., by shaking him at 6:15 a.m., and then became concerned at approximately 6:30 a.m. Both parties agree that when Reed examined Ruark and observed his labored breathing, he "immediately became concerned for Dennis' safety (App. 215)". Both parties agree Ruark occasionally went to bed with a "cud" of tobacco in his mouth, and it is undisputed by plaintiffs, that Ruark was habitually hard to awaken in the morning evidenced by Defendant Drury's deposition testimony utilized by plaintiffs in their brief. (Pl. App. 481-484). Both parties agree an ambulance was summoned for Ruark's care within fifty (50) minutes of the original wake up call at 6 a.m. Both parties agree in their statement of the case that approximately one hour elapsed from the time of the first wake up call to the time that Ruark departed by ambulance for the hospital. Finally, it is undisputed Ruark was pronounced dead at 7:36 a.m. on September 30, 1985, of a morphine overdose which shut his system down and caused him to aspirate on his own stomach contents.

Since there is no dispute as to the basic facts surrounding the lawsuit, it then becomes an issue for the Court to determine whether or not there is sufficient evidence of alleged wrongful acts to allow the case to go to a jury. As pointed out by the trial court in its Order,

". . . it is of paramount importance in a deliberate indifference case to be mindful that, if generally construed as a claim of negligence, plaintiff's claims must fail. . . . " (A-20).

Ruark's self-imposed condition of drug induced unconsciousness did not go undetected because of Comer's alleged inability to identify medical emergencies. The condition was not detected because of the hour of the day and Ruark's habitual problem with early morning awakenings.

An unfortunate coincidence of the hour of his death, with the hour of wake-up calls, does not raise respondents' conduct to the level of conscious disregard for Ruark's medical need. Respondents must have had knowledge of Ruark's condition before they could consciously disregard it.

As this Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202 (1986), "if the evidence is merely colorable . . . or is not significantly probative, . . . summary judgment may be granted." There must be issues of fact material to the resolution of the dispute between the parties before the non-moving party can escape a motion for summary judgment. Having failed to produce sufficient evidence to create a genuine issue as to whether respondents committed the allegedly unlawful acts, summary judgment in respondents' favor was appropriate.

CONCLUSION

The Petition for Writ of Certiorari should be denied. As this Court stated in *Anderson v. Liberty Lobby*, 477 U.S. 242, 252:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Respondents would submit the evidence required to find for petitioners is absent in the case now before the Court. For the reasons stated and set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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